Supreme Court, U.S.
FILED
991604 APR 3 - 2000
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

LORI DOLAN, *et al.*,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LOUIS TARASI
THE TARASI LAW FIRM, P.C.
510 Third Avenue
Pittsburgh, PA 15219-2191
(412) 391-7135

ARNOLD LEVIN
Counsel of Record
LAURENCE S. BERMAN
LEVIN, FISHBEIN, SEDRAN & BERMAN
510 Walnut Street, Suite 500
Philadelphia, PA 19106
(215) 592-1500

LEE C. SWARTZ
TUCKER, ARENSBERG & SWARTZ
111 North Front Street
P.O. Box 889
Harrisburg, PA 17108
(717) 234-4121

Attorneys for Petitioners

158881

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Prior to a jury trial on the merits of the claims of ten personal injury plaintiffs who claimed injuries as a result of their exposure to radiation and radioactive material released during the Three Mile Island accident of March 28, 1979, the federal district court presiding over the matter (the Middle District of Pennsylvania) conducted extensive *in limine* hearings, in two separate sessions, lasting approximately seven weeks in total length, to determine the admissibility of the opinions of the experts proffered by the ten plaintiffs. The district court conducted the *in limine* hearing in a manner that essentially transformed a Federal Rule of Evidence 104(a) evidentiary proceeding into the equivalent of a non-jury trial on the merits, resulting in fact finding and conclusions of law by the trial court that excluded the majority of the expert evidence proffered and then the entry of summary judgment against the ten plaintiffs. Accordingly, this petition raises the question of whether extensive *in limine* hearings may serve as a surrogate for a trial on the merits, in connection with a district court fulfilling its role as the gatekeeper with respect to the admissibility of expert evidence. More specifically, this petition raises the following question:

I. Whether the district court's transformation of an *in limine* proceeding into a far-reaching search for the truth violated: (a) petitioners' Seventh amendment right to a trial by jury; (b) the intent of Federal Rule of Civil Procedure 1 that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy and inexpensive determination of every action"; and (c) the distinction to be drawn between the purpose and format of an evidentiary hearing to be conducted pursuant to Federal Rule of Evidence 104(a) and the purpose of the Federal Rules of Civil Procedure governing discovery embodied in Federal Rules of Civil Procedure 26 and 37?

PARTIES TO THE PROCEEDING

The interested parties, Petitioners, who appeared before the United States Court of Appeals for the Third Circuit at Docket No. 96-7623 (3d Cir.) are as follows: Lori Dolan; Joseph Gaughan; Ronald Ward; Estate of Pearl Hickernell; Kenneth Putt; Estate of Ethelda Hilt; Paula Obercash; Jolene Peterson; Estate of Gary Villella and Estate of Leo Beam. In addition, Petitioners who appeared before the United States Court of Appeals for the Third Circuit at Docket No. 96-7625 (3d Cir.) are as follows: Arnold Levin, Laurence S. Berman and Lee Swartz. The appeal at Third Circuit Docket No. 96-7625 (3d Cir.) was also brought by the plaintiffs identified in the Joint Appendix[1] hereto (Appendix M), beginning at J. App. 684. Those plaintiffs are the respondents to the Petition being filed by General Public Utilities Corp., *et al.*

The Respondents to this Petition are General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott, Incorporated, Raytheon Constructors, Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc.

---

1. Since both the Petitioners and Respondents hereto are filing petitions for writ of certiorari in this matter, a separate bound Joint Appendix ("J.App.") is being filed herewith.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	vii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provision and Rules Involved	2
Statement of the Case	4
A. Introduction	4
1. The Petitioners	5
2. The Petitioners' Expert Team And Their Fed. R. Civ. P. 26 Reports	6
3. The TMI Defendants' In Limine Attack On Petitioners' Experts	9
4. The Petitioners' Response To Defendants' In Limine Attacks	9

Contents

Page

5. Petitioners' Arguments That An In Limine Hearing Was Not Necessary Was Rejected By The District Court — Instead An Excessive Hearing Was Conducted 10

6. The Criteria Utilized By The District Court In Determining The Reliability And Admissibility Of Petitioners' Experts' Opinions Demonstrates Its Misconception That An In Limine Hearing Can Be Utilized As A Surrogate For A Jury Trial 11

7. Relying Primarily On Fed. R. Civ. P. 26 And 37, The TMI District Court Excluded Experts' Affidavits And Other Evidence Submitted By Petitioners To Defend Their Experts' Opinions, And Sanctioned Petitioners' Counsel, In Part, For Making These In Limine Submissions 13

   - The District Court's Order of November 9, 1995 and Opinion of January 5, 1996 14

   - The District Court's Opinion of April 2, 1996 15

   - The District Court's Memorandum Opinion of August 7, 1996 16

Contents

Page

8. The Third Circuit Improperly Affirmed The District Court's Departure From Usual Proceedings, Its Conduct Of The *In Limine* Inquiry And Fed. R. Civ. P. 26-Based Rulings, And The Sanctioning Of Petitioners' Counsel 16

Reasons for Granting the Writ 18

I. A Writ Of Certiorari Should Issue Because The District Court Intruded So Far Into The Seventh Amendment Right To A Jury Trial In Its Attempt To Discharge Its Daubert Gate-Keeping Responsibility, That It Departed From The Accepted And Usual Course Of Judicial Proceedings 18

II. A Writ Of Certiorari Should Issue Because District Courts Must Be Instructed That In Considering The Admissibility Of Expert Evidence, The Scope Of The Challenged Expert's Response Must Not Be Limited To Matters That Appeared In The Initial Federal Rule Of Civil Procedure 26 Expert Disclosure 22

a. A Writ Should Issue To Confirm That Daubert Admissibility Inquiries Are Conducted Pursuant To Fed. R. Evid. 104(a); Rule 104(a) Permits A Wide

Contents

Page

Array Of Evidence To Be Presented In The Context of A Daubert Based Challenge 25

b. A Fed. R. Evid. 104(a) Inquiry Is Evidentiary In Nature And Focuses On The Parties' Rights To Be Heard On The Evidentiary Issue, Not On The Enforcement Of Discovery Deadlines Or Limitations 26

c. The Requirements And Purposes Of Fed. R. Civ. P. 26(a)(2)(B) Are Incompatible With Those Of Fed. R. Evid. 104(a) 27

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Bourjaily v. United States, 483 U.S. 171 (1987) 13, 23, 25

California v. Green, 399 U.S. 149 (1970) 13

Cortes-Irzarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997) 26

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

Fitzgerald v. Smith & Nephew Richards, Inc., No. 00-1145 (4th Cir.) 21

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 18, 22

Hines v. Consol. Rail Corp., 926 F.2d 262 (3d Cir. 1991) 26

In re Diet Drugs Litigation, MDL 1203 (E.D. Pa.) 21

In re Hanford Reservation Litigation, Nos. 98-36142-144, 98-36147, 98-36149 and 98-36173 (9th Cir.) 20, 21, 22

In re Orthopedic Bone Screw Litigation, MDL 1014 (E.D. Pa.) 21

Cited Authorities

Page

In re Paoli R.R. Yard PCB Lit., 916 F.2d 829 (3d Cir. 1990) 26

In re Paoli R.R. Yard PCB Lit., 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995) 12, 26

In re TMI, 67 F.3d 1103 (3d Cir. 1995), *cert. denied*, 516 U.S. 1154 (1996) 5, 8

In re TMI Litigation Cases Consolidated II, 940 F.2d 832 (3d Cir. 1991), *cert denied sub nom, Gumby v. General Public Utilities Corp.*, 503 U.S. 906 (1992) 5

Kiick v. Metropolitan Edison Co., 784 F.2d 490 (3d Cir. 1986) 5

Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999) 18, 22

Padillas v. Stork-Gamco, Inc., 186 F.3d 412 (3d Cir. 1999) 17, 26

Statute:

28 U.S.C. § 1254(1) 2

Cited Authorities

Page

United States Constitution:

Seventh Amendment 2, 18

Rules:

Fed. R. Civ. P. 1 ..... 3, 10, 21

Fed. R. Civ. P. 26 ..... *passim*

Fed. R. Civ. 26(a) 14

Fed. R. Civ. P. 26(a)(1) 27

Fed. R. Civ. P. 26(a)(2)(A) 3

Fed. R. Civ. P. 26(a)(2)(B) . 3, 8, 14, 22, 23, 24, 27, 28, 29

Fed. R. Civ. P. 26(a)(2)(C) 14

Fed. R. Civ. P. 26(f) 14

Fed. R. Civ. P. 37 ..... i, 13, 17

Fed. R. Civ. P. 37(b)(2)(B) 4

Fed. R. Civ. P. 42 5

Fed. R. Evid. 104(a) ..... *passim*

Cited Authorities

	Page
Fed. R. Evid. 104(b)	24
Fed. R. Evid. 403	22
Fed. R. Evid. 702	22, 27
Fed. R. Evid. 703	22
Fed. R. Evid. 1101(d)	25
Fed. R. Evid. 1101(d)(1)	2, 25

Other Authorities:

Bert Black, *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 Tex. L.R. 715 (1994) 12

Federal Civil Judicial Procedure and Rules, Advisory Comm. Note to Fed. R. Civ. P. 26 (West ed., 1999) 28

Petitioners respectfully pray that a Writ Of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, which affirmed Orders of the United States District Court for the Middle District of Pennsylvania that excluded the majority of the expert evidence proffered by the Petitioners, sanctioned Petitioners' counsel under Federal Rule of Civil Procedure 37, and affirmed the entry of summary judgment.

OPINIONS BELOW

The relevant reported and unreported Opinions and Orders of the United States Court of Appeals for the Third Circuit and the United States District Court for the Middle District of Pennsylvania appear in the Joint Appendix hereto ("J.App.-xx") beginning at the page indicated, as follows: Opinion of the United States Court of Appeals for the Third Circuit, reported at 193 F.3d 613 (3d Cir. 1999) [J.App. 1a]; Order of the United States Court of Appeals for the Third Circuit amending opinion, reported at 199 F.3d 158 (3d Cir. 2000) [J.App. 275a]; unreported Memorandum and Order of the United States District Court dated August 7, 1996 [J.App. 280a]; Memorandum of the United States District Court, 927 F. Supp. 834 (M.D. Pa. 1996) [J.App. 295a]; Memorandum and Order of the United States District Court, 922 F. Supp. 997 (M.D. Pa. 1996) [J.App. 394a]; Memorandum and Order of the United States District Court, 922 F. Supp. 1038 (M.D. Pa. 1996) [J.App. 497a]; Memorandum and Opinion of the United States District Court, 911 F. Supp. 775 (M.D. Pa. 1996) [J.App. 537a]; Memorandum and Order of the United States District Court, 910 F. Supp. 200 (M.D. Pa. 1996) [J.App. 664a]; unreported Order of the United States District Court dated and filed November 9, 1995 [J.App. 671a]; unreported Order of the United States District Court dated and filed November 9, 1995 [J.App. 677a]; Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing dated January 4, 2000 [J.App. 680a]; Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing dated January 4, 2000 [J.App. 682a].

STATEMENT OF JURISDICTION

The Court of Appeals' opinion was filed on November 2, 1999, and a timely filed petition for rehearing was denied on January 4, 2000. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Seventh Amendment Of The United States Constitution:

> In Suits at common law, where the value and controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fed. R. Evid. 104(a):

> **(a) Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except for those with respect to privileges.

Fed. R. Evid. 1101(d)(1):

> **(d) Rules inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations:
>
> > **(1) Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

Fed. R. Civ. P. 1:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every action.

Fed. R. Civ. P. 26(a)(2)(A)(B):

> **Disclosure of Expert Testimony**
>
> **(A)** In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
>
> **(B)** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the part regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 37(b)(2)(B):

> **(b) Failure to Comply With Order**
>
> **(2) Sanctions By Court In Which Action Is Pending.** If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others, the following:
>
> * * *
>
> **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

STATEMENT OF THE CASE

A. Introduction

This lawsuit involves the nuclear plant accident that occurred at Unit 2 at Three Mile Island ("TMI") on March 28, 1979. Petitioners seek personal injury damages as a result of their exposure to radiation and radioactive material that was released during the course of the TMI accident. To date, no personal injury lawsuit resulting from the TMI accident has ever been tried to a jury, in spite of over 2000 personal injury and consortium claims having been filed. Instead, the claims of the Petitioners as well as those of the other plaintiffs, have

suffered delay upon delay, first as a result of a belated determination that no federal court jurisdiction existed over these claims, *see Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986), then as a result of defendants' lobbying of Congress to create retroactively federal court jurisdiction over these claims, *see In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert denied sub nom, Gumby v. General Public Utilities Corp.*, 503 U.S. 906 (1992), then as a result of an interlocutory appeal on whether the TMI defendants breached a duty to plaintiffs. *See In re TMI*, 67 F.3d 1103 (3d Cir. 1995), *cert. denied*, 516 U.S. 1154 (1996), and finally as a result of an extensive *in limine* hearing that excluded virtually all expert evidence proffered by the Petitioners, leading to the entry of summary judgment against them (and against all other plaintiffs whose cases were administratively consolidated by the district court). *See In re TMI Litigation*, 193 F.3d 613 (3d Cir. 1999) [J.App. 1a-274a], as amended, 199 F.3d 158 (3d Cir. 2000) [J.App. 275a-279a].[2]

This Petition asks this Court to exercise its supervisory power to remedy the judicial errors suffered by Petitioners as a result of the district court's extreme departure from the accepted and usual course of judicial proceedings in the discharge of its gate-keeping responsibility. Respectfully, Petitioners request this Court to make clear to the TMI district court, and other lower courts around the country, that *in limine* proceedings shall not be used as a surrogate for a jury trial.

1. The Petitioners

Petitioners are ten plaintiffs who were selected from a group of nearly 2,000 plaintiffs who filed claims as a result of the TMI accident to have their cases discovered and tried to a jury

---

2. The Third Circuit reversed the summary judgment entered against the 2,000 other plaintiffs pursuant to Federal Rule of Civil Procedure 42. *In re TMI*, 193 F.3d at 723-727 [J.App. 257a-270a]. The 2000 other plaintiffs are the respondents to the Petition for Certiorari of General Public Utilities Corp., *et al.*

in anticipation that the outcome of their cases might be predictive of the outcome of other plaintiffs' cases, to possibly lead to an amicable resolution of the claims of the other plaintiffs. While the ten individuals selected for this purpose were intended to represent a cross-section of the kinds of claims that were in litigation, the Petitioners were not designated as class representatives for the other plaintiffs and in fact, no class action had been certified or even attempted to be certified in connection with this personal injury litigation. Had Petitioners' cases reached a jury trial, they would have been the only TMI personal injury cases to have ever been presented to a jury, even though the accident occurred so long ago.

However, Petitioners' cases were dismissed on summary judgment grounds by the district court, after the exclusion of virtually of all of their expert evidence. *In re TMI*, 927 F. Supp. 834 (M.D. Pa. 1996) [J.App. 295a]. The district court also monetarily sanctioned Petitioners' counsel based, in part, on their submissions of certain expert affidavits and other evidence during the course of the *in limine* challenge in response to and defense of the attacks made by defendants against Petitioners' experts. *In re TMI*, (Memorandum, August 7, 1996, M.D. Pa.) [J.App. 280a].

2. The Petitioners' Expert Team And Their Fed. R. Civ. P. 26 Reports

Given that the TMI accident involved complex circumstances, petitioners proffered a substantial amount of scientific evidence. Petitioners retained approximately 20 well-qualified experts to evaluate and support their case. Together, the experts analyzed the TMI accident from its roots in the TMI facility, to the release of radiation into the environment, to the dispersion of radiation into populated areas, to the affects of radiation on exposed persons and plant life, and to general health affect trends that are traceable to the accident.

Each expert had a specific area of responsibility, such as the analysis of: data on the pathways of escape of radiation

from TMI; data on meteorological conditions; data on the TMI area topography; damage to trees; damage to chromosomes; damage to immune systems; disease trends; and more. Therefore, the experts had expertise in a variety of fields such as nuclear engineering, meteorology, radiation genetics, immunology, epidemiology, and medicine.

Indeed, Petitioners' experts were highly credentialed. They included an impressive team of experts from Russia assembled under the direction of Professor Vladimir Shevchenko, a Ph.D. in biological sciences in the former Soviet Union, who along with his team members, had been active investigators of the Chernobyl nuclear accident, *see In re TMI Litigation*, 193 F.3d at 683-684 [J.App. 158a] (qualifications of Professor Shevchenko discussed); *Id.* at 693 [J.App. 181a] (qualifications of Dr. Gennady Kozubov discussed); *Id.* at 695 [J.App. 187a] (qualifications of Dr. Olga Tarasenko discussed); *Id.* at 688, n.120 [J.App. 169a] (qualifications of Dr. Galina Snigiryova discussed).

Aside from the Russian team of experts, Petitioners also proffered, *inter alia*, the expert opinions of Steven Wing, a Ph.D. and Assistant Professor at the University of North Carolina who has been involved in radiation studies of workers at various U.S. Department of Energy facilities, for example, Oakridge, Hanford, Los Alamos and Savannah River, *Id.* at 708-709 [J.App. 221a]; Ignaz Vergeiner, a Ph.D. meteorologist from Austria, *Id.* at 666-67 [J.App. 114a]; Dr. James Gunckel, a Harvard educated biologist and distinguished Professor Emeritus at Rutgers University who also collaborated over a 20-year period at the Brookhaven National Laboratory studying the effects of radiation on plants, *Id.* at 677-678 [J.App. 142a]; and Dr. Douglas Crawford-Brown, a Ph.D. at the University of North Carolina and Director for the Institute for Environmental Studies at that University. *Id.* at 713-714 [J.App. 234a]. Clearly, Petitioners' experts were no lightweights in their respective fields. Further, they were not the type or kind of experts who have engendered the scorn of defendants who have argued that

"junk science" must not be permitted to be admitted into evidence to support frivolous personal injury plaintiffs' claims.

Petitioners' experts' testimony fell into two main categories: One category of expert testimony primarily concerned the dose of radiation to which plaintiffs were exposed. In this category, the experts proffered opinions in areas such as nuclear engineering, meteorology, and radiation genetics. The other major category of expert testimony was medical causation that pertained to the causative relationship between petitioners' medical conditions and exposure to TMI radiation. The medical causation category of testimony included experts such as consulting physicians and treating physicians.

The overall theory posited by petitioners' experts was that the TMI accident resulted in higher radiation releases than previously thought and conceded by defendants, and that those releases made their way to populated areas around TMI, causing injuries to those who were exposed. The Third Circuit had previously held that the TMI defendants had breached their duty of care owed to the plaintiffs. *In re TMI*, 67 F.3d 1103, 1119 (3d Cir. 1995), *cert. denied*, 516 U.S. 1154 (1996).

The petitioners' experts' Fed. R. Civ. P. 26 opinions, including exhibits and other supporting materials, were hundreds of pages in length. They set forth in substantial detail the experts' opinions. Additionally, many of petitioners' experts were deposed at length. In those depositions, defendants had full and fair opportunities to question the experts on their opinions and the bases therefor.

Defendants never argued that petitioners' experts' reports failed to comply with the disclosure requirements of Fed. R. Civ. P. 26(a)(2)(B). Moreover, defendants' depositions of the experts served to supplement their opinions and Rule 26 disclosures. This underscores petitioners' compliance with Fed. R. Civ. P. 26.

Accordingly, petitioners assembled a comprehensive set of expert evaluations in an effort to prove their cases.

3. The TMI Defendants' In Limine Attack On Petitioners' Experts

The TMI defendants attacked petitioners' expert evidence in an extremely aggressive fashion. Defendants deposed eleven of petitioners' experts. These depositions consumed some 25 days. Defendants also produced twenty-nine expert reports, which filled four bound volumes. In some instances, defendants produced multiple experts within the same field to double or triple team the countering expert proffered by the plaintiffs. The reports critiqued in minute detail petitioners' experts' opinions, methodologies and techniques.

The defendants' expert reports served as a basis for a 400 page memorandum filed by defendants to support their motion to exclude petitioners' expert evidence on the issue of dose, and a separate 175 page memorandum to support their motion to exclude petitioners' expert testimony on medical causation.

4. The Petitioners' Response To Defendants' In Limine Attacks

Faced with defendants' assault on their expert evidence, petitioners responded with legal briefs, and by submitting affidavits of their experts, and other evidentiary materials, which rebutted, explained, amplified and/or supplemented their experts' initial reports. *These affidavits and evidentiary materials did not change the principal theories and concepts advanced in the petitioners' experts' reports. Rather, they were directly responsive to the criticisms directed at petitioners' experts by defendants and their experts.* Petitioners also included with their *in limine* responses affidavits of additional scientists to support the methodologies, techniques and theories used by petitioners' experts. Again, the point of all of these *in limine* submissions was to explain and defend the methodologies and techniques used by petitioners' experts so as to prevent their testimony from being excluded from evidence.

5. Petitioners' Arguments That An In Limine Hearing Was Not Necessary Was Rejected By The District Court — Instead An Excessive Hearing Was Conducted

Petitioners argued that the gate-keeping role required minimal district court involvement, and that based on the submissions, no *in limine* hearing was necessary. They argued that they were entitled to proceed to a jury as there was a sufficient *prima facie* showing of the reliability of their experts' opinions to meet admissibility standards. They argued that the burden to establish *prima facie* reliability was less than the burden of establishing truth-in-fact. They argued that defendants would have full opportunity at trial to cross-examine Petitioners' experts to demonstrate any perceived flaws in Petitioners' experts' opinions or methodologies. The district court, however, rejected all of these arguments. [J.App. 671a; J.App. 677a].

Instead, the district court required the parties to participate in an extensive *in limine* hearing, with the live appearance of virtually all of the experts, at an enormous cost to Petitioners and the judicial system. Seven weeks of hearings were conducted! The record on appeal to the Third Circuit consisted of almost 20,000 pages, for a case that was not even tried! Hundreds of thousands of dollars were spent on experts' fees! Defendants were permitted to parade before the court about 15 defense experts to testify as much about the facts of the case, as about the reliability of the opinions of Petitioners' experts! All for a preliminary hearing on the admissibility of expert evidence that was supposed to be conducted pursuant to the rules of law that expert evidence is to be liberally admitted, and that the civil rules are to be "construed and administered to secure the just, speedy and *inexpensive* determination of every action." Fed. R. Civ. P. 1 (emphasis added).

Petitioners contend that what actually occurred was a non-jury trial, without even the Petitioners or other fact witnesses appearing. The *in limine* hearing became a surrogate for a jury

trial. Such pretextual use of the *in limine* hearing process is wrong, and a far departure from the accepted, usual and anticipated course of judicial proceedings.

6. The Criteria Utilized By The District Court In Determining The Reliability And Admissibility Of Petitioners' Experts' Opinions Demonstrates Its Misconception That An In Limine Hearing Can Be Utilized As A Surrogate For A Jury Trial

In its "far-reaching search for the truth", the district court inappropriately developed a 12-step, laundry list of criteria against which to assess the reliability of Petitioners' experts' opinions. *See In re TMI*, 911 F. Supp. at 786-87 [J.App. 542a-543a]; Order, Nov. 9, 1995 [J.App. 673a-675a]. This "list" improperly intruded into the right to have a jury determine the facts in dispute, as the district court's findings were substituted to reach these ultimate questions. The district court should have confined itself to the reliability determination.

The 12-step, laundry list approach adopted by the district court was itself not likely to — and, in this case, did not yield — accurate and reliable assessments of Petitioners' experts' proffers. The district court cannot be faulted for lacking in energy. Indeed, its mistakes are traceable to its excessive zeal, and to its fervid desire to ensure that it deeply probed the reliability of the opinions of Petitioners' experts before allowing them to be admitted into evidence before a jury.

In *Daubert,* this Court identified four non-exclusive factors as helpful criteria for determining the reliability of scientific evidence. The Third Circuit added four more yardsticks to the *Daubert* list, specifying that trial courts should determine: (1) whether the method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be

reliable; (7) the qualifications of the expert witness testifying based on the methodologies; and (8) the non-judicial uses to which the method has been put. *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 742, n. 8 (3d Cir. 1994).

Had the district court stopped there and simply applied the standards set by this Court and perhaps by the Third Circuit, it may have been on safe ground. Unfortunately though, it did not. For reasons both unexplained and inexplicable, the district court decided that 8 criteria was not enough and more were necessary. Thus, it decided that the Petitioners' experts would have to surmount four additional hurdles. The district court:

> also [f]ound the following [additional] factors to be relevant: Falsifiability; . . . Logical Consistency; . . . Consistency with Accepted Theory; . . . [and] Precision"

In re TMI, 911 F. Supp. at 787 [J.App. 542a-543a]. It culled these criteria from a list of nine compiled by a prominent member of the tort reform bar, Bert Black. *See id.*, *citing* Bert Black, *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 Tex. L.R. 715, 783-84 (1994).

The district court's list was a departure from the accepted and usual course of judicial proceedings for determining the admissibility of expert evidence. While this Court identified four criteria, and the Third Circuit identified 8 in *Paoli*, and Bert Black suggested 9 commandments, the district court decreed 12. The district court cited no authority (other than Mr. Black) in support of its distended list. This swollen catalog of essential criteria that the district court required Petitioners to satisfy for the admissibility of the expert evidence of each and every one of the experts' opinions has no support under the Rules of Evidence or this Court's decisions.

The district court's adherence to its complicated, untested methodology, that had never been approved or validated by scientists or courts, completely ignored this Court's admonition that "[v]igorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert* 509 U.S. 579, 596 (1993).

Accordingly, Petitioners respectfully request that this Petition be granted to assure that lower courts recognize the time-tested tool, the cross-examine process, which this Court once described as "the greatest legal engine ever invented for the discovery of truth", *California v. Green*, 399 U.S. 149, 158 (1970) as the primary method for exposing perceived flaws in expert opinions. Attempts to classify, measure and rank scientists on the basis of a self-devised laundry list of criteria denies parties the right to a trial by jury.

7. Relying Primarily On Fed. R. Civ. P. 26 And 37, The TMI District Court Excluded Experts' Affidavits And Other Evidence Submitted By Petitioners To Defend Their Experts' Opinions, And Sanctioned Petitioners' Counsel, In Part, For Making These In Limine Submissions

As if the transformation of the *in limine* hearing into a surrogate trial on the merits was not enough of a departure from usual proceedings, the district court compounded its error by conducting the proceedings without regard to the holding of this Court in *Bourjaily v. United States*, 483 U.S. 171 (1987), regarding the scope of evidence to be considered in a Fed. R. Evid. 104(a) proceeding.

Defendants' *in limine* memoranda, and petitioners' responses thereto, were filed at various points in an *in limine* process that lasted approximately five months from about October, 1995 until March, 1996. That process included briefing, submission of findings of fact and conclusions of law, and a number of *weeks* of *in limine* hearings, which of course, were outside the presence of any jury.

While the length of time of the *in limine* process and amount of submissions involved may create the impression that petitioners' expert evidence and defenses of same were considered in full, that is not the case. In fact, the district court struck and refused to consider a substantial number of the affidavits petitioners included with their *in limine* responses. Also, the district court found that petitioners' counsel acted in a sanctionable fashion by making such *in limine* submissions. *In re TMI*, 922 F. Supp. at 1000-08 [J.App. 395a-416a]; Memorandum, August 7, 1996 [J.App. 280a].

The district court's rulings were premised on its view that petitioners could not support their *in limine* responses with additional affidavits of petitioners' own experts or other experts. According to the district court, doing so violated Fed. R. Civ. P. 26(a), which mandatorily requires certain expert disclosures, and Fed. R. Civ. P. 26(f), pursuant to which the Court had entered case management orders that included provisions on expert disclosures. The district court's rulings in that regard may be summarized as follows:

- **The District Court's Order of November 9, 1995 and Opinion of January 5, 1996**

In an Order dated November 9, 1995, the district court granted defendants' motion *in limine* as to a certain collection of materials that petitioners submitted along with their response to defendants' motion *in limine* regarding petitioners' dose experts. [J.App. 677a-679a]. Because the November 9 Order was not issued with an opinion, the district court provided an opinion in its reported decision, *In re TMI Litigation Cases Consol. II*, 911 F. Supp. 775 M.D. Pa. (1996) [J.App. 537a]. There, the court made clear that its November 9 Order was premised on its view that petitioners had violated Fed. R. Civ. P. 26(a)(2)(B) and (C) by submitting purportedly "late" reports. *In re TMI*, 911 F. Supp. 828-29 [J.App. 656a-661a]. Furthermore, it is clear that the court saw these reports only as an attempt to add to the facts of the case, and that the

court did not view these documents in the context of Fed. R. Evid. 104(a) and the evidentiary process established thereby. The court rejected plaintiffs' argument that plaintiffs had the right to respond to defendants' expert challenges with reports, submissions, and collaborative evidence to establish evidentiary admissibility of the underlying opinions being challenged.

- **The District Court's Opinion of April 2, 1996**

In an April 2, 1996 Opinion, reported as *In re TMI Litigation Cases Consol. II*, 922 F. Supp. 997 (M.D. 1996), [J.App. 394] the district court issued another decision regarding the expert affidavits and other evidentiary materials that petitioners proffered to support the scientific validity of their experts' opinions. There, the district court found that these submissions were untimely Rule 26 expert reports that were submitted without the required leave of court and, therefore, violated Rule 26. *In re TMI*, 922 F. Supp. at 1001-08 [J.App. 395a-416a]. In connection with that finding, the court took two steps. First, the court excluded from evidence what it found to be "supplemental" affidavits that were filed after January 5, 1996. The court chose January 5, 1996 as the cut-off date because on that date, it had issued its reported decision in which it had disapproved of such submissions (911 F. Supp. at 828-29 [J.App. 656a-661a]) and considered that decision to have put petitioners' on notice that such submissions could not be made. Accordingly, all of the expert affidavits and other evidentiary materials submitted after January 5, 1996, were stricken as violative of Rule 26, regardless of the purpose of the submission and any prejudice to the defendants other than the prejudice that would result upon a finding of the admissibility of the opinions of the experts being challenged. *In re TMI*, 922 F. Supp. at 1008. [J.App. 416a].

Second, the court found that the conduct of petitioners' counsel in submitting the expert affidavits and other evidentiary materials was sanctionable. The court notified the parties and counsel that it would issue a separate order to show cause why

monetary sanctions should not be imposed against petitioners' counsel. *In re TMI*, 922 F. Supp. at 1008. [J.App. 416a].

- **The District Court's Memorandum Opinion of August 7, 1996**

On August 7, 1996, the district court entered its opinion regarding the monetary sanctions issue. [J.App. 280a]. It is clear from the court's August 7 Memorandum that it viewed the matter as one governed by Fed. R. Civ. P. 26 and that petitioners had violated the mandatory disclosure provisions of that Rule, as well as orders issued pursuant to subsection(f) of Rule 26. The district court never even mentioned Fed. R. Evid. 104(a) and the ability to present evidence pursuant to that Rule. That was so even though petitioners presented substantial arguments on that issue to the court.

In essence, the district court seemed to be concerned more with admissibility questions that arise at a *trial* of a case, where an opposing party may be entitled to protection from unfair surprise found in testimony that is beyond the scope of an expert report, than with the reliability question that is presented in an *in limine* challenge to expert evidence.

8. The Third Circuit Improperly Affirmed The District Court's Departure From Usual Proceedings, Its Conduct Of The *In Limine* Inquiry And Fed. R. Civ. P. 26-Based Rulings, And The Sanctioning Of Petitioners' Counsel

The Third Circuit affirmed the manner in which the district court conducted the *in limine* proceedings, the district court's rulings as to petitioners' submissions of expert affidavits and other evidentiary material, and the sanctioning of petitioners' counsel. In *In re TMI Lit.*, 193 F.3d 613 (3d Cir. 1999 [J.App. 1a]), the Third Circuit, quoting at length to portions of the district court's opinion reported at 922 F. Supp. at 1000-04 [J.App. 405a], found that petitioners violated Rule 26 in submitting the affidavits and other evidentiary material.

In re TMI Lit. 193 F.3d at 719-723. [J.App. 243a-257a]. The Third Circuit further held that, due to petitioners' purported violations of Rule 26, it was correct for the district court to impose sanctions on petitioners' counsel pursuant to Fed. R. Civ. P. 37. *In re TMI Lit.*, 193 F.3d at 721-22, 28. [J.App. 252a-257a; 269a-270a].

The Third Circuit's opinion did not address at all Fed. R. Evid. 104(a) or petitioners' arguments thereunder. Therefore, the Third Circuit apparently concluded that none of the submissions or evidence at issue could properly be made part of the *in limine* proceedings pursuant to Fed. R. Evid. 104(a). Petitioners therefore sought a rehearing. This request was denied.

The Third Circuit then amended its opinion. *In re TMI Lit.*, 199 F.3d 158 (3d Cir. 2000). [J.App. 275a]. In its amended opinion, the Third Circuit addressed Petitioners' Fed. R. Evid. 104(a) arguments made in their rehearing request. In that rehearing request, petitioners made detailed arguments regarding the effect of Fed. R. Evid. 104(a) and, in particular, relied on the Third Circuit's recent decision in *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir. 1999). In *Padillas*, the Third Circuit held, *inter alia*, that parties have a fundamental right to defend their expert's opinions through the presentation of evidence at a Rule 104(a) *in limine* hearing.

The Third Circuit rejected petitioners' arguments based on Rule 104(a) and *Padillas*. Among other things, it found that the district court gave sufficient consideration to petitioners' defense of their experts' testimony. It found that the district court did so through the *in limine* hearings. *In re TMI Lit.*, 199 F.3d at 159. [J.App. 276a-279a].

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE DISTRICT COURT INTRUDED SO FAR INTO THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL IN ITS ATTEMPT TO DISCHARGE ITS DAUBERT GATE-KEEPING RESPONSIBILITY, THAT IT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

This Petition raises significant issues regarding the manner in which a district court is to discharge its gate-keeping responsibility with respect to the admissibility of expert evidence. While this Court has given some guidance in its decisions in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), further guidance is still required in order to assure uniform approaches to the gate-keeping role by trial courts, particularly to assure consistency and recognition of the right to a trial by jury that is assured by the Seventh Amendment of the United States Constitution, and to correct the extreme departure from the usual course of proceedings that occurred to Petitioners.

This case presents but one example of the abuse that can result in the absence of clarification by this Court. This case demonstrates a circumstance where the Petitioners proffered highly credentialed experts to express expert opinions about a variety of issues related to the TMI accident, including causation of injury. Petitioners' experts did not proffer short, one or two-page reports that were conclusory in nature. They proffered comprehensive reports of varying lengths, some of which exceeded 100 pages, as part of the comprehensive scientific inquiry that was necessitated by the complexity of the accident.

While Petitioners recognize that a district court has been charged with a gate-keeping responsibility for determining the admissibility of expert evidence, and that courts of appeal are to review the conclusions reached by a district court against an abuse of discretion standard, this Court has not given guidance about whether the amount of probing of the expert's opinion in which a district court can engage can reach a level that is essentially a surrogate for a trial of the entirety of the case. Yet, that is what occurred in this case. As noted above, upon Petitioners' submission of their expert evidence, the defendants embarked on lengthy deposition discovery of the experts, and some of the Petitioners' experts were deposed for as much as three full days on reports that may have totaled 100 pages or more. Defendants then submitted volumes of countering expert reports and moved *in limine* pursuant to this Court's *Daubert* decision for an *in limine* determination of whether or not any of Petitioners' expert evidence met the reliability standards for admissibility into evidence.

What was crystallized by the process was that highly credentialed experts proffered by plaintiffs and defendants had a difference of opinion. This presented a classic jury question, and the case should have proceeded to trial. Clearly, summary judgment could not have been entered on the basis of the record, because Petitioners' expert evidence established the existence of a material issue of fact.

The process simply went awry. The district court conducted approximately four weeks of full-day hearings regarding one wave of Petitioners' "dose" experts, requiring each expert to appear live for courtroom testimony (other than a few experts whose testimony was provided by video and/or deposition testimony because of their unavailability), and then conducted a second wave of in-court hearings lasting approximately three additional weeks under a similar format.

This manner of conducting the *in limine* inquiry far exceeded what Petitioners believe this Court contemplated in charging the district courts with a gate-keeping responsibility. While it may appear that what occurred in this case is an example of an extreme, Petitioners' counsel are familiar with other circumstances where district courts have inappropriately transformed the *Daubert in limine* question into a proceeding for the resolution of the entirety of a case, as though the *Daubert* responsibility has authorized district courts to transform jury trial cases to a non-jury status.

Although Petitioners' primary counsel is a relatively small law firm in Philadelphia of approximately eleven attorneys, their practice concentrates in the federal courts, particularly in complex MDL matters and/or class actions. They are a co-counsel in litigation involving the Hanford Nuclear Reservation where the plaintiffs suffered a similar fate to the fate of the instant TMI Petitioners, *i.e.*, a massive *Daubert* challenge to expert evidence and a resulting summary judgment in favor of defendants. That case is on appeal in the Ninth Circuit. *In re Hanford Reservation Litigation*, Nos. 98-36142-144, 98-36147, 98-36149 and 98-36173 (9th Cir.).

The *Hanford* litigation demonstrates another example of a departure from the accepted and usual course of proceedings. In that case, the district court, similar to the method of the *TMI* district court, precluded the plaintiffs from filing expert affidavits to *respond* to defendants' experts' *Daubert* challenges, with the admonition that sanctions would be imposed if such submissions were attempted. Moreover in *Hanford*, no *Daubert* hearing was held, as the district court combined the *Daubert* and summary judgment proceedings into one, before granting summary judgment. Plaintiffs were denied their right to a jury trial as the district court utilized its *Daubert* power and the proceedings thereon as a surrogate for the jury trial. *See In re Hanford Nuclear Reservation Litigation*, 1998 WL 7751340 (E.D. Wa. 1998).

Most recently, in an MDL case pending before the Honorable Louis C. Bechtle, *In re Diet Drugs Litigation*, MDL 1203 (E.D. Pa.), a *two-day Daubert* hearing was conducted on the admissibility of the expert opinions of two of plaintiffs' experts. The format of that inquiry was similar to what occurred in *TMI* and *Hanford*, *i.e.*, defendants attempted to overwhelm the court and plaintiffs with the opinions of multiple defense experts attacking the reliability of the plaintiffs' experts. The briefing and submissions on the issue, like in *TMI* and *Hanford*, is literally volumes large, without even taking into account the length of the transcript of the proceedings. The cost to the plaintiffs exceeded $100,000. This is but a microcosm of how district courts are attempting to fulfill their gate-keeping role, but it demonstrates that what has become the accepted and usual course of proceedings is a far cry from the dictate of Fed. R. Civ. P. 1, that the administration of justice be speedy and *inexpensive*.[3] It seems that for every expert proffered by a plaintiff, multiple defense experts surface to support an *in limine* challenge. It has become gamesmanship, with the cards favoring the party that can outspend the other in expert fees.

Accordingly, this case deserves review, as it will afford the Court an opportunity to not only remedy the wrongs suffered by Petitioners by the overly invasive inquiry made by the district court with respect to the admissibility of Petitioners' expert evidence, but also to dispel any notion among the district courts that the gate-keeping responsibility can be used as a surrogate for the trial by jury to which plaintiffs are entitled.

---

3. Petitioners' counsel have also been involved in multiple *Daubert* proceedings in MDL litigation also pending before Judge Bechtle in, *In re Orthopedic Bone Screw Litigation*, MDL 1014 (E.D. Pa.). As an outgrowth of the *Orthopedic Bone Screw* litigation, upon the remand of an individual case to the transferor court, further *Daubert* proceedings occurred that resulted in the exclusion of evidence and the entry of summary judgment against the plaintiff. That case is also on appeal. *See Fitzgerald v. Smith & Nephew Richards, Inc.*, No. 00-1145 (4th Cir.).

II. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE DISTRICT COURTS MUST BE INSTRUCTED THAT IN CONSIDERING THE ADMISSIBILITY OF EXPERT EVIDENCE, THE SCOPE OF THE CHALLENGED EXPERT'S RESPONSE MUST NOT BE LIMITED TO MATTERS THAT APPEARED IN THE INITIAL FEDERAL RULE OF CIVIL PROCEDURE 26 EXPERT DISCLOSURE

A writ should issue to instruct district courts that a Fed. R. Evid. 104(a) *Daubert* inquiry as to whether expert testimony meets the reliability and other admissibility requirements of the Federal Rules of Evidence, including Fed. R. Evid. 403, 702 and 703, should be made without reference to whether the proffers made by the challenged expert in defense of the expert opinion were contained in the expert's Fed. R. Civ. P. 26 expert disclosure. This Court has not addressed this issue in *Daubert, Joiner or Kumho*. Guidance on the issue is crucial to the fair and proper resolution of *Daubert* issues. That is because it directly affects the scope and nature of a *Daubert in limine* challenge.

Based on the decisions of the TMI district court and the Third Circuit's affirmance thereof, and on the district court decision in *Hanford*, a court can restrict the evidence presented in a Rule 104(a) inquiry to that which is encompassed in the expert's Rule 26(a)(2)(B) expert disclosure. Those rulings confirm the improper mindset held by at least some district courts, that an *in limine* hearing is the equivalent of a trial on the merits. But using Rule 26 to restrict the scope of information that an expert can proffer to defend a challenge to the admissibility of the expert's opinion, is directly contrary to Rule 104(a) and unduly restricts the evidence which parties may present to attack or defend experts' testimony in a Rule 104(a) context. Indeed, the Rule 26(a)(2)(B) expert disclosure requirement serves an entirely different purpose than what is at

issue at a Rule 104(a) hearing. This Court should, therefore, grant a writ to clarify the law on this point and fill an important gap in the still-developing *Daubert* law.

In this regard, a *Daubert* inquiry regarding the admissibility of expert evidence raises an evidentiary issue to be resolved under Fed. R. Evid. 104(a). As this Court has made clear, Rule 104(a) permits a very broad type and range of information to be considered by a Court, even information that is otherwise inadmissible. *Bourjaily v. United States*, 483 U.S. 171 (1987). By applying Fed. R. Civ. P. 26(a)(2)(B) to limit the broad type and nature of evidence that can be submitted in the context of a Rule 104(a) *Daubert in limine* challenge, to only that information contained in the Rule 26 disclosure, a court violates Rule 104(a) and this Court's decision in *Bourjaily*. It also interferes with the parties' abilities to fully and fairly attack or defend the expert testimony at issue. That, in turn, keeps from a court information that could be important, even crucial, to its admissibility determination. That is because much information relevant to resolving a *Daubert* challenge may not be in a Rule 26 expert report or in documents, depositions or other discovery related thereto. Indeed, Rule 26(a)(2)(B) requires only a narrowly proscribed set of expert-related information to be produced, such as the basis of an expert's opinion and data relied on in reaching that opinion. Fed. R. Civ. P. 26(a)(2)(B). But that does not come close to addressing the wide variety of information and issues which may be involved in a *Daubert* Rule 104(a) hearing, and the probing that district courts are allowing. Subjects as diverse as peer review, industry standards and scholarly articles may properly not be contained in a Rule 26 disclosure, yet they may become critical during the *Daubert* inquiry.

Given all of this, this Court's ruling on the issue presented here will directly impact on the breadth of the record that can be developed when *Daubert* challenges are made. Petitioners contend that the burden for establishing the admissibility of

expert evidence is light, as cross-examination affords protection against juries accepting outrageous conclusions proffered by experts. But once a district court determines to proceed to a more in depth *in limine* inquiry, it must recognize that the proceeding is evidentiary, governed by Rule 104(a), without limitations imposed by the discovery rules. If courts are permitted to apply Fed. R. Civ. P. 26(a)(2)(B) to limit the type of *in limine* submissions that can be made, then expert evidence may be improperly precluded not because of reliability concerns, but because of the misuse of a discovery rule to limit the scope of an evidentiary inquiry. As stated, that would be directly contrary to Fed. R. Evid. 104(b), and inimical to the Rule 104(a) *in limine* process that takes place when *Daubert*-based challenges are made. While a party may be entitled to protection at trial from an expert attempting to proffer an opinion not contained in a Rule 26 disclosure, the policy reason for affording that protection (unfair surprise in front of a jury) is not relevant to a *Daubert* hearing, which presumably is not occurring before the ultimate trier of the facts (the jury).

As previously stated, the requirements for expert disclosures set by Fed. R. Civ. P. 26(a)(2)(B) are simply incompatible with the Fed. R. Evid. 104(a) evidentiary process. However, as is clear from the *TMI* case, Rule 26 has been relied upon to limit the type and scope of information that can be presented in a Rule 104(a) *Daubert in limine* inquiry. This is directly contrary to Fed. R. Evid. 104(a) and unduly limits the type of evidence that can be utilized in a *Daubert in limine* inquiry. Accordingly, there is a need for this Court's guidance on this issue.

a. A Writ Should Issue To Confirm That Daubert Admissibility Inquiries Are Conducted Pursuant To Fed. R. Evid. 104(a); Rule 104(a) Permits A Wide Array Of Evidence To Be Presented In The Context of A Daubert Based Challenge

When a *Daubert*-based challenge is made to scientific or other expert evidence, a district court should conduct that challenge pursuant to Fed. R. Evid. 104(a).

Rule 104(a) provides as follows:

> **(a) Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except for those with respect to privileges.

Fed. R. Evid. 104(a).

Also applicable in the context of a Rule 104(a) inquiry is Fed. R. Evid. 1101(d). That Rule provides that

> [t]he rules [of evidence] (other than those with respect to privileges) do not apply . . . [to][t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

Fed. R. Evid. 1101(d)(1).

Because the "rules of evidence (other than those with respect to privileges) do not apply to a Rule 104(a) inquiry," it is clear that, under Rule 104(a), a court can consider an extremely wide range of evidence, even evidence that is inadmissible, in making its preliminary determination as to the admissibility of evidence. *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987) (holding that a court can consider

inadmissible hearsay in making a Rule 104(a) preliminary determination).

b. A Fed. R. Evid. 104(a) Inquiry Is Evidentiary In Nature And Focuses On The Parties' Rights To Be Heard On The Evidentiary Issue, Not On The Enforcement Of Discovery Deadlines Or Limitations

A Fed. R. Evid. 104(a) *Daubert* inquiry is evidentiary. It provides a court with a mechanism by which it can preliminarily determine the admissibility of expert evidence. Rule 104(a), therefore, does not focus at all on discovery deadlines or limitations. Rather, it is focused on the need for a court to make a preliminary determination as to the admissibility of evidence. The courts have also emphasized that a Rule 104(a) inquiry must include adequate process so that the party whose expert evidence is attacked *in limine* has a full and fair opportunity to defend the reliability of the evidence, especially where summary judgment may flow from the exclusion. *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417-18 (3d Cir. 1999); *Cortes-Irzarry v. Corporacion Insular*, 111 F.3d 184, 188 (1st Cir. 1997); *In re Paoli R.R. Yard PCB Lit.*, 35 F.3d 717, 739 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 272-73 (3d Cir. 1991); *In re Paoli R.R. Yard PCB Lit.*, 916 F.2d 829, 854-55 (3d Cir. 1990).

Accordingly, Fed. R. Evid. 104(a) establishes an evidentiary process in which there is a fundamental right to be heard on evidentiary issues, including issues as to the admissibility of expert evidence. Rule 104(a) does not establish discovery requirements or timetables.

c. The Requirements And Purposes Of Fed. R. Civ. P. 26(a)(2)(B) Are Incompatible With Those Of Fed. R. Evid. 104(a)

In light of the foregoing discussion, it is clear that the purposes and requirements of Fed. R. Civ. P. 26 are not compatible with those of Fed. R. Evid. 104(a).

As previously stated, Rule 104(a) provides a mechanism for the court to make a preliminary assessment of the admissibility of evidence. Rule 104(a), therefore, is concerned with what testimony, documents or other materials will be permitted into evidence. In the context of *Daubert*, that requires a consideration of whatever information may shed light on the reliability of the scientific or other expert evidence at issue. That assessment is driven by the policies of the Rules of Evidence, such as Rule 702's liberal policy of admissibility of expert testimony that will assist the trier of fact.

Fed. R. Civ. P. 26 is focused on discovery schedules and requirements. Thus, Rule 26 sets certain mandatory disclosures that the parties must make. Fed. R. Civ. P. 26(a)(1). Among those mandatory disclosures are disclosures regarding the party's experts. In that respect, Rule 26(a)(2)(B) sets out specific information that must be disclosed regarding experts:

> **(B)** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the part regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all

> publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Rule 26(a)(2)(B).

The expert witness information required by Rule 26(a)(2)(B) must be contained in an expert report so that an opposing party is adequately informed of the basis of an expert's opinion, and has sufficient information to depose an expert if the need for expert depositions is not eliminated or minimized. *See Federal Civil Judicial Procedure and Rules*, Advisory Comm. Note to Fed. R. Civ. P. 26, pp. 148-49 (West ed., 1999).

But the expert witness information required under Rule 26(a)(2)(B) does not come close to dealing with the large range of issues, subjects and information which are raised by a Rule 104(a) *Daubert* inquiry. They may include, but are not limited to, the following:

- scholarly articles;
- scientific studies;
- testimony by experts in the relevant field proffered especially for Rule 104(a) purposes;
- explanations by the party's expert as to concepts, methodologies, terms or other aspects or issues not necessarily contained in the Rule 26 report;
- whether the methodology used by an expert is also generally employed by other experts in the field;
- whether the methodology or technique at issue has been tested and is it subject to retesting;
- the practices in the expert's industry; and
- whether the opinion at issue has been peer reviewed.

Unless experts' Rule 26 disclosures are required to be treatises, items such as those identified above simply will not necessarily be included in a Rule 26 expert disclosure. Indeed, Rule 26(a)(2)(B) simply does not require such information to be included in expert disclosures.

Given all that, it is critical that parties not be limited by Rule 26 when they are attempting to establish or attack the reliability of an expert's opinion, methodology or technique in the context of a Rule 104(a) inquiry. To impose Rule 26 standards on Rule 104(a) inquiries will inevitably lead to the exclusion of information that should be considered for Rule 104(a) purposes. In fact, a strict application of Rule 26(a)(2)(B) to a Rule 104(a) inquiry may lead to the exclusion of materials such as scholarly articles which support an expert's technique or methodology. There is no valid reason, particularly given the broad evidentiary purpose of Rule 104(a), for such an outcome.

The district court's conduct of the *in limine* hearing in this case with Rule 26 restrictions violated the nature of a Rule 104(a) inquiry.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARNOLD LEVIN
Counsel of Record
LAURENCE S. BERMAN
LEVIN, FISHBEIN, SEDRAN & BERMAN
510 Walnut Street, Suite 500
Philadelphia, PA 19106
(215) 592-1500

LEE C. SWARTZ
TUCKER, ARENSBERG & SWARTZ
111 North Front Street
P.O. Box 889
Harrisburg, PA 17108
(717) 234-4121

LOUIS TARASI
THE TARASI LAW FIRM, P.C.
510 Third Avenue
Pittsburgh, PA 15219-2191
(412) 391-7135

Attorneys for Petitioners

Supreme Court, U.S.
FILED
MAY 03 2000
CLERK

No. 99-1604

IN THE

Supreme Court of the United States

LORI DOLAN, *et al.*,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS GENERAL PUBLIC UTILITIES CORPORATION, *et al.*

A. H. WILCOX
Counsel of Record
ELLEN KITTREDGE SCOTT
PEPPER HAMILTON LLP
Attorneys for Respondents General Public Utilities Corporation, et al.
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

159445

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENTS

A. In addition to General Public Utilities Corporation, the following Respondent companies are joining in this opposition:

Metropolitan Edison Company; Jersey Central Power & Light Company; Pennsylvania Electric Company; McDermott Incorporated (previously known and identified as J. Ray McDermott & Company); Raytheon Constructors Inc. (previously known and identified as Catalytic, Inc.); Burns & Roe Enterprises, Inc.; and Dresser Industrial Valve and Instrument Division of Dresser Industries, Inc.

B. Rule 29.6 Statements for the Respondents are as follows:

Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company, are each wholly-owned subsidiaries of General Public Utilities Corporation. No publicly held company owns 10% or more of the stock of General Public Utilities Corporation.

McDermott Incorporated is a wholly-owned subsidiary of McDermott International, Inc. The Prudential Insurance Company of America owns more than 10% of the stock of McDermott International, Inc.

Burns & Roe Enterprises, Inc. is a wholly-owned subsidiary of Roe Enterprises, Inc., which is a wholly-owned subsidiary of Winona Hudson Corporation, which is a wholly-owned subsidiary of Warwick and York, Inc. No publicly held company owns 10% or more of the stock of Warwick and York, Inc.

Raytheon Constructors Inc. is a wholly-owned subsidiary of Raytheon Constructors International, Inc., which is a wholly-owned subsidiary of Raytheon Engineers & Constructors International, Inc., which is a wholly-owned subsidiary of Raytheon Company. Franklin Resources, Inc. owns more than 10% of the stock of Raytheon Company.

Dresser Industries, Inc. is a wholly-owned subsidiary of Halliburton Company. No publicly held company owns 10% or more of the stock of Halliburton Company.

TABLE OF CONTENTS

	Page
List of Parties and Corporate Disclosure Statements	i
Table of Contents	iii
Table of Cited Authorities	v
Counterstatement of the Case	1
1. The Trial Court Did Not Exclude True Rebuttal or Explanatory Material	1
2. The Trial Court Did Not "Require" Petitioners To Meet a "Swollen Catalog of Essential Criteria"	4
Reasons for Denying the Writ	6
A. How The Gatekeeping Function Was Performed in This Case Does Not Warrant Review	6
1. Plaintiffs' Seventh Amendment Rights Were Not Compromised	6
2. Petitioners' Contention That The Burden of Establishing Reliability Is "Light" Is Mistaken	8
3. Petitioners' Quarrel With the Intensity of the District Court's Efforts Does Not Warrant Review	9

Contents

Page

B. The Supposed Conflict Between Rule 104 of the Federal Rules of Evidence and Rules 26 and 37 of the Federal Rules of Civil Procedure Does Not Warrant Review 12

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Allison v. McGhan Medical Corp., 184 F.3d 1300 (11th Cir. 1999) 8

Barrett v. Atlantic Richfield Co., 95 F.3d 375 (5th Cir. 1996) 7

Bourjaily v. United States, 483 U.S. 171 (1987) .. 12

Cabrera v. Cordis Corp., 134 F.3d 1418 (9th Cir. 1998) 7

Cavallo v. Star Enterprise, 100 F.3d 1150 (4th Cir. 1996) 7

Clark v. Takata Corp., 192 F.3d 750 (7th Cir. 1999) 7

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 7, 10

In re Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990) 12

In re TMI Litig. Cases Consol. II, 922 F. Supp. 997 (M.D. Pa. 1996) 2

Cited Authorities

Page

Jaurequi v. Carter Manufacturing Co, Inc., 173 F.3d 1076 (8th Cir. 1999) 7

Kalamazoo River Study Group v. Rockwell Intl. Corp., 171 F.3d 1065 (6th Cir. 1999) 7

Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137 (1999) 5, 7, 11

Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594 (9th Cir. 1996) 8

Mitchell v. Gencorp Inc., 165 F.3d 778 (10th Cir. 1999) 8

Turrentine v. Bell Canada, 173 F.3d 846 (2d Cir.), *cert. denied*, 120 S. Ct. 538 (1999) 7

Vadala v. Teledyne Indust., Inc., 44 F.3d 36 (1st Cir. 1995) 7

Weisgram v. Marley Co., 120 S. Ct. 1011 (2000) 7, 8

United States Constitution:

Seventh Amendment 6, 7, 9

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 26 ..... 12, 13, 14

Fed. R. Civ. P. 26(a) 2

Fed. R. Civ. P. 26(a)(2)(B) 12

Fed. R. Civ. P. 37 ..... 12, 14, 15

Fed. R. Civ. P. 37(c)(1) 15

Fed. R. Evid. 104 ..... 1, 12, 14, 15

Fed. R. Evid. 104(a) 12, 14, 15

Fed. R. Evid. 702 ..... 9, 15

Other Authority:

Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345 (1994) 14

Petitioners assert in the first part of their Petition that they were accorded too much process — that the district court examined too carefully their proposed expert evidence. In this regard, Petitioners contend that *Daubert* notwithstanding, district courts should not take too seriously their gatekeeping responsibilities. Petitioners assert in the second part of their Petition that they were accorded too little process — that the district court refused to consider much material from Petitioners' experts that had not been disclosed timely. In this regard, Petitioners contend that deadlines for expert disclosures should not be relevant in a hearing under Fed. R. Evid. 104, inquiring into whether the proposed expert testimony is admissible.

Neither of Petitioners' fundamentally inconsistent pleas requires or deserves review by this Court.

COUNTERSTATEMENT OF THE CASE

Petitioners are generally correct in their description, when shorn of its characterizations, of the events from which the case arose and the course of proceedings below. Two respects in which the Petition misdescribes the record, however, could be meaningful to an assessment of the questions presented and must be addressed.

1. The Trial Court Did Not Exclude True Rebuttal or Explanatory Material

The major premise for Petitioners' argument that they were unfairly hamstrung in their efforts to establish the reliability of their expert witness proffers is their assertion that the district court refused to consider, as untimely, affidavits and reports which merely sought to explain, but not change, their timely expert reports. Thus they emphasize, by italics, their claim:

> *These* [the untimely] *affidavits and evidentiary materials did not change the principal theories and concepts advanced in the petitioners' expert reports. Rather, they were directly responsive to the criticisms directed at petitioners' experts by defendants and their experts.*

Petition at 9.

This claim is simply not true. Respondents did not challenge any reports or disclosures properly characterized as rebuttal or supplemental under Fed. R. Civ. P. 26(a). The materials which Respondents objected to, and the trial court excluded, presented different methods or techniques to arrive at similar conclusions, or changes to a described method or technique in an effort to cure a flaw in the original which had been exposed by Respondents' *in limine* challenge, or reports from altogether new and different experts proposing to testify about altogether new and different analyses of new and different data, well after the deadline for expert disclosures had passed.

For example, as the trial court observed with respect to Petitioners' leading expert:

> Each time Professor Shevchenko states his methodology Defendants challenge a component of that methodology and Professor Shevchenko alters the methodology to rebut the challenge. . . . A purportedly scientific opinion that constantly changes merely to avoid critique can hardly be said to be based upon "good grounds."

In re TMI Litig. Cases Consol. II, 922 F. Supp. 997, 1015 (M.D. Pa. 1996) (J. App. 434a).

Similarly, Petitioners had timely proffered one expert, Dr. Portman, to testify about radiation levels as he estimated them to have been, based on his analysis of porcelain insulators taken from old electric fences in the area. Respondents criticized this analysis on two principal grounds: (1) it failed to take account of background radiation levels, which could fully explain its findings; and (2) it failed to take account of the radiation due to uranium in the porcelain glaze. Faced with these challenges, Petitioners did not call Portman to testify at the *in limine* hearing, but instead sought to submit a new analysis, from a new expert, Dr. Smierennyi, based on an analysis of enamel from teeth extracted from residents in the area. Smierennyi's analysis, however, could hardly be characterized as something "which rebutted, explained, amplified and/or supplemented" (Petition at 9) Petitioners' original expert's analysis based on electric fence insulators. Smierennyi's method involved a different medium, a different analytic model, and a different witness, yet Petitioners never sought leave of court to make this radical untimely change.

These are but examples of the constantly shifting means by which Petitioners sought to buttress or maintain the conclusions of their original experts They illustrate, however, how Petitioners misrepresent the record when they assert that their untimely expert presentations merely "explained" their timely submissions, or "rebutted" Respondents' critiques of their timely submissions.[1]

1. Petitioners' effort to shore up their experts' conclusions, in response to Respondents' reliability challenge under *Daubert*, was fundamentally misguided in any event: under this Court's decision in *Daubert*, the focus of the admissibility inquiry must be on methodology, not conclusions. *Daubert v. Merrell Dow*

(Cont'd)

2. The Trial Court Did Not "Require" Petitioners To Meet a "Swollen Catalog of Essential Criteria"

Petitioners' second potentially significant mischaracterization of the record is their assertion that the district court adopted twelve different criteria that it required their proffered expert testimony to meet, and that:

> This swollen catalog of essential criteria that the district court required petitioners to satisfy for the admissibility of each and every one of the experts' opinions has no support under the Rules of Evidence or this Court's decisions.

Petition at 12.

In the first place, it is apparent that many of the "swollen catalog" of criteria are simply a different way of describing exactly the same criteria which this Court identified in *Daubert*. Thus, although Petitioners castigate the district court for adopting the criterion of "falsifiability" (Petition at 12), this is identical to "testability," which this Court identified as the hallmark of scientific methodology. *Daubert*, 509 U.S. at 593. Petitioners similarly castigate the district court for adopting the criterion of "consistency with accepted theory," yet this Court also articulated "general acceptance" as a mark of reliable science. *Id.* at 594. And Petitioners condemn the district court's reference to

---

(Cont'd)

Pharmaceuticals, Inc., 509 U.S. 579, 594-95 (1993). Two or three demonstrably unreliable methods do not validate another demonstrably unreliable method, even though all of them might suggest the same (Q.E.D.) conclusion.

"precision" as a potentially relevant criterion, yet this Court has identified the "known or potential rate of error" as another potentially relevant factor in the reliability analysis. *Id.* The last category identified by the district court, "logical consistency," hardly ought to be controversial.

Petitioners' criticism of the district court for articulating the various ways in which it intended to assess reliability is misguided for additional reasons. The majority decision in *Daubert* itself makes plain that the criteria articulated there are suggestions, not a litmus test. 509 U.S. at 593. In addition, the district court here made plain that it did not (contrary to Petitioners' claim) regard each and every "criterion" in its "catalog" to be "essential" to admissibility. As the district judge herself explained:

> Again, the court must stress that it is not using these factors as a checklist. Failure to meet [one or another] factor listed above will not *per se* indicate inadmissible evidence. The court, rather, views both sets of factors as a flexible construct from which the court will develop an opinion as to the reliability of the evidence.

J. App. at 675a. This approach is fully consistent with this Court's opinion in *Daubert*, and its more recent opinion in *Kumho Tire*.[2]

Thus neither of the stated factual premises on which the Petition is based finds support in the actual record below.

---

2. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

REASONS FOR DENYING THE WRIT

A. How The Gatekeeping Function Was Performed in This Case Does Not Warrant Review

Petitioners' first reason for granting review is that the critical assessment of the reliability of their expert testimony is said to trespass on their Seventh Amendment rights to a trial by jury. According to Petitioners, once the qualifications of their experts were recognized, any difference of opinion with defendants' experts represented nothing more than "a classic jury question" requiring trial. Petition at 19. According to Petitioners, the district court infringed on their right to a jury trial by having a hearing — especially a lengthy and expensive hearing — on the admissibility of Petitioners' expert testimony. *Id.* at 18-21.

Petitioners point to no conflict in the Circuits, or with prior decisions of this Court, justifying review. To the contrary, the arguments advanced by Petitioners are contradicted by this Court's several decisions over the past few years dealing with expert testimony.

1. Plaintiffs' Seventh Amendment Rights Were Not Compromised

Plaintiffs assert that by granting summary judgment as a consequence of the performance of the gatekeeping function, the courts below trampled on plaintiffs' jury trial right under the Seventh Amendment. As recently as this February, however, this Court affirmed that a plaintiff's Seventh Amendment rights were not compromised when an appellate court determined that expert testimony had been admitted improperly under *Daubert*, that the verdict-winning plaintiff had not provided other evidence sufficient to fill

the gap created by the appellate court's exclusion of that expert testimony, and therefore that judgment as a matter of law should be entered against the plaintiff. *Weisgram v. Marley Co.*, 120 S. Ct. 1011 (2000).

Indeed, each of *Daubert*, *Joiner*,[3] and *Kumho Tire* involved a case in which the lower court's exclusion of expert testimony resulted in summary judgment dismissing the plaintiff's claim.[4] Plainly, there is no Seventh Amendment

3. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

4. Cases in the Courts of Appeals, in which summary judgment flowed from the exclusion of expert evidence, are legion: *See, e.g., Vadala v. Teledyne Indust., Inc.*, 44 F.3d 36 (1st Cir. 1995) (affirming summary judgment following exclusion of expert testimony regarding cause of airplane crash); *Turrentine v. Bell Canada*, 173 F.3d 846 (2d Cir.) (affirming summary judgment following exclusion of medical causation testimony in repetitive stress injury litigation), *cert. denied*, 120 S. Ct. 538 (1999); *Cavallo v. Star Enterprise*, 100 F.3d 1150 (4th Cir. 1996) (affirming summary judgment following exclusion of medical causation expert testimony in fuel spill litigation); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996) (affirming summary judgment following exclusion of medical causation expert testimony in environmental contamination superfund litigation); *Kalamazoo River Study Group v. Rockwell Intl. Corp.*, 171 F.3d 1065 (6th Cir. 1999) (affirming summary judgment following exclusion of medical causation expert testimony in PCB litigation); *Clark v. Takata Corp.*, 192 F.3d 750 (7th Cir. 1999) (affirming grant of summary judgment following exclusion of biomechanical engineer's expert testimony regarding lap belt failure in an auto accident); *Jaurequi v. Carter Manufacturing Co, Inc.*, 173 F.3d 1076 (8th Cir. 1999) (affirming summary judgment following exclusion of mechanical engineer and human factors expert testimony in products liability litigation); *Cabrera v. Cordis Corp.*, 134 F.3d 1418 (9th Cir. 1998) (affirming

(Cont'd)

impediment to the district courts' performance of their gatekeeping role, even if the consequence is summary judgment.

2. Petitioners' Contention That The Burden of Establishing Reliability Is "Light" Is Mistaken

Petitioners contend that "the burden for establishing the admissibility of expert evidence is light, as cross-examination affords protection against juries accepting outrageous conclusions proffered by experts." Petition at 23-24. According to Petitioners, the *in limine* process here "crystallized . . . that highly credentialed experts proffered by plaintiffs and defendants had a difference of opinion. This presented a classic jury question, and the case should have proceeded to trial." Petition at 19.

Again, Petitioners point to no conflict in the Circuits, or with prior decisions of this Court, justifying review. It is Petitioners' contention which conflicts with this Court's recent decisions. As Justice Ginsburg, writing for a unanimous Court, observed in *Weisgram*, *supra*: "Since *Daubert*, . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." 120 S. Ct. at 1021.

(Cont'd)

summary judgment following exclusion of medical causation testimony in products liability action); *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594 (9th Cir. 1996) (affirming summary judgment following exclusion of medical causation testimony in Bendectin litigation); *Mitchell v. Gencorp Inc.*, 165 F.3d 778 (10th Cir. 1999) (affirming summary judgment following exclusion of medical causation expert testimony in toxic exposure litigation); *Allison v. McGhan Medical Corp.*, 184 F.3d 1300 (11th Cir. 1999) (affirming summary judgment following exclusion of medical causation expert testimony in breast implant litigation).

Nor is it true, as Petitioners suggest, that the district courts should terminate the gatekeeping inquiry as soon as it is determined that a proffered expert is "credentialed." The text of Rule 702 itself reflects that "qualifications" is a consideration separate and apart from whether "scientific, technical, or other specialized knowledge will assist the trier of fact. . . ." Fed. R. Evid. 702. And one cannot read *Daubert* to conclude that evidence of an expert's qualifications forecloses further consideration of the reliability of the expert's proposed testimony. The criteria suggested in *Daubert* relate not to the qualifications of the witness, but to the scientific reliability of the proposed testimony. This is apparent from Justice Blackmun's description of the task. The gatekeeping function "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-93.

Petitioners' singular focus on their experts' supposed qualifications finds no support in this Court's decisions.

3. Petitioners' Quarrel With the Intensity of the District Court's Efforts Does Not Warrant Review

The third theme pervading Petitioners' Seventh Amendment argument is that by conducting a seven week *in limine* hearing, that hearing "became a surrogate for a jury trial." Petition at 10-11. Obviously regarding such proceedings as excessive, Petitioners characterize the district court's actions as a "pretextual use of the *in limine* hearing process. . . ." *Id.* at 11. These criticisms, however, are contradicted by the record and this Court's own decisions.

As the Petition states:

> Given that the TMI accident involved complex circumstances, petitioners proffered a substantial amount of scientific evidence. Petitioners retained approximately 20 well-qualified experts to evaluate and support their case. . . .
>
> Each expert had a specific area of responsibility, such as the analysis of: data on the pathways of escape of radiation from TMI; data on meteorological conditions; data on the TMI area topography; damage to trees; damage to chromosomes; damage to immune systems; disease trends; and more.

Petition at 6-7. These multiple experts "proffered comprehensive reports of varying lengths, some of which exceeded 100 pages, as part of the comprehensive scientific inquiry that was necessitated by the complexity of the accident." Petition at 18.

The standard for review of the district court's decision whether to conduct an *in limine* hearing is one of abuse of discretion:

> Our opinion in [*General Electric Co. v.*] *Joiner* [522 U.S. 136, 118 S.Ct. 512 (1997)] makes clear that a court of appeals is to apply an abuse-of-discretion standard when it review[s] a trial court's decision to admit or exclude expert testimony. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (internal citation and quotation marks eliminated). Given the complexity of the subject matter and the extensiveness of the expert materials which had to be evaluated, it can hardly be said to have been an abuse of discretion for the district judge to decide that she wanted to have a hearing, and that she wanted the experts to explain first hand (and be subject to cross examination about) their methods and how they applied them here.

Considering that Respondents, as the parties challenging the expert proffers, had to make their own showing on the lack of reliability of the methods used by Petitioners' experts, and that Petitioners then were given an opportunity to have their experts explain and defend their methodologies, it is hardly remarkable that the district court heard from 31 experts, seventeen from plaintiffs' side and fourteen from the defendants' side. Nor, considering the scientific complexity of many of the subject areas involved, is it surprising that the district court devoted 20 days, in total, to those hearings.[5]

In sum, given the facts and circumstances of this case, the *in limine* process utilized by the district court went far to protect, and certainly did not trammel, Petitioners' rights.[6]

---

5. While those 20 days were spread over seven different weeks, that does not make it true, as the Petition exclaims: "Seven weeks of hearings were conducted!" Petition at 10.

6. The Court of Appeals for the Third Circuit has made plain to the district courts in that Circuit that when summary judgment may flow from a decision to exclude proffered expert evidence, courts must be careful to assure that there is "adequate process at

(Cont'd)

B. The Supposed Conflict Between Rule 104 of the Federal Rules of Evidence and Rules 26 and 37 of the Federal Rules of Civil Procedure Does Not Warrant Review

Petitioners' second major contention is that the courts below erred in restricting the *in limine* process to an assessment of Petitioners' *timely* expert disclosures. Petitioners assert that according to Fed. R. Evid. 104(a) and this Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987), the district courts are required to consider theretofore undisclosed reasons why a disclosed opinion is reliable. Central to this contention is their assertion that "Rule 26(a)(2)(B) [Fed. R. Civ. P.] requires only a narrowly prescribed set of expert-related information to be produced. . . ." Petition at 23.

The short answer to this contention is that Fed. R. Civ. P. 26(a)(2)(B) in fact commands the disclosure of "a *complete* statement of *all* opinions to be expressed *and the basis and reasons therefore;* [and] *the data or other information considered* by the witness in forming the opinions. . . ." (Emphasis added.) Certainly this includes, at a minimum, a description of the methodology utilized by the witness, and how she applied it in the circumstances at hand.

(Cont'd)

the evidentiary stage. . . ." *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 854 (3d Cir. 1990). Process, undoubtedly, requires time, and time has its associated expense. It is therefore ironic that Petitioners' counsel would complain about the cost to them (Petition at 10, 21), in this entrepreneurial litigation, of the process intended to protect their clients' rights.

Under the regime advocated by Petitioners, an expert could proffer an opinion with virtually no description of how it was arrived at. The litigation adversary could then take the expert's deposition and develop several compelling reasons why the expert's method, as described in the deposition, was unreliable, and therefore why the opinion should not be accepted as scientifically reliable. However, when confronted with an *in limine* motion based on this record, the proponent of the expert would be free to advance any additional grounds which either the challenged expert, or any other expert, could come up with as to why the original conclusion was valid. Even though there would have been no opportunity to challenge these new grounds through the adversarial process, the trial court would be required to accept evidence about and presumably even credit these hitherto undisclosed grounds.

Nothing in this Court's jurisprudence supports such a rejuvenation of the "trial by ambush" approach. Rule 26, in fact, was adopted precisely to foreclose such an approach. *See* Advisory Committee Notes to 1993 Amendments ("The information disclosed under the former rule in answering interrogatories about the 'substance' of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness."). One of the most thoughtful commentators on the process to be developed in the wake of *Daubert*, Professor Berger, has written on precisely this issue:

> Although the district court has enormous discretion on how to proceed, oral testimony and depositions should clearly be preferred [over affidavits]. Courts should not permit parties to

> submit evidence from undisclosed experts or to raise new issues for the same reasons [they] should not allow defendants to rely on this evidence in obtaining a Rule 104(a) inquiry. Courts cannot attain the Supreme Court's objective in *Daubert* — to honor the "liberal thrust" of the Federal Rules towards expert opinion while simultaneously demanding reliability — if they base decisions to exclude experts on allegations not yet tested through the adversarial process.
>
> Consequently, a court should generally *restrict its review to materials developed during discovery* when it rules on a Rule 104(a) motion. . . .

Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1374-75 (1994) (emphasis added).

Second, Petitioners would convert Rule 104's *permission* to hear inadmissible evidence (presumably when the institutional values of the Rules warrant doing so) into a *command* to hear inadmissible evidence, regardless of the institutional values of the Rules. The values sought to be furthered by Fed. R. Civ P. 26 and 37 — an adversarial process strengthened by disclosure in advance of the hearing or trial — are in no way inconsistent with the values sought to be furthered by Fed R. Evid. 104(a), which simply recognizes the practical necessities attendant upon some types of preliminary inquiries (for example, the impracticability of requiring the declarant to appear and testify that he was unavailable to testify, or of requiring the decedent to appear and testify that his was indeed a dying

declaration). Rule 104, after all, is itself a procedural rule in service of the content of other rules, such as Fed. R. Evid. 702, which substantively demands that proffered expert scientific testimony be scientifically reliable. It would be inconsistent with that latter rule to hold that untested, undisclosed, and therefore inadmissible evidence of supposed scientific reliability must nevertheless be used to assess scientific reliability. The potential for mischief is apparent.

Second, as a straightforward matter of interpretation, the automatic sanction of exclusion adopted by Fed. R. Civ. P. 37(c)(1) applies "at a trial, at a hearing, or on a motion." A hearing under Fed. R. Evid. 104, on an *in limine* motion to exclude, is plainly within the specific text of the Rule. Petitioners' argument would have the general permission granted by Fed. R. Evid. 104(a) supplant the specific enforcement device mandated by Fed. R. Civ P. 37, even though precisely the same goal (an adversarial process enhanced by disclosure, rather than compromised by ambush) applies as well to the proceeding under Rule 104(a) to assess reliability, as to the ultimate trial of the issue of fact to which the proposed expert testimony is addressed. These are precisely the circumstances in which the canon of construction that the specific controls over the general applies, and negates Petitioners' contention.

Thus both reason and record point to the same result: there is nothing warranting this Court's plenary review of the rulings challenged by Petitioners.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

A. H. WILCOX
Counsel of Record
ELLEN KITTREDGE SCOTT
PEPPER HAMILTON LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Attorneys for Respondents General Public Utilities Corporation; Metropolitan Edison Company; Jersey Central Power & Light Company; Pennsylvania Electric Company; McDermott Incorporated (previously known and identified as J. Ray McDermott & Company); Raytheon Constructors Inc. (previously known and identified as Catalytic, Inc.); Burns & Roe Enterprises, Inc.; and Dresser Industrial Valve and Instrument Division of Dresser Industries, Inc.

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

(3)

No. 99-1604

IN THE

Supreme Court of the United States

LORI DOLAN, *et al.*,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

LOUIS M. TARASI, JR.
THE TARASI LAW FIRM, P.C.
510 Third Avenue
Pittsburgh, PA 15219-2191
(412) 391-7135

ARNOLD LEVIN
Counsel of Record
LAURENCE S. BERMAN
LEVIN, FISHBEIN, SEDRAN & BERMAN
510 Walnut Street, Suite 500
Philadelphia, PA 19106
(215) 592-1500

LEE C. SWARTZ
TUCKER, ARENSBERG & SWARTZ
111 North Front Street
P.O. Box 889
Harrisburg, PA 17108
(717) 234-4121

Attorneys for Petitioners

159774

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

15 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Review Is Necessary To State A Rule Of Law That Restricts District Courts From Transforming A *Daubert* Hearing Into A Surrogate For The Seventh Amendment Jury Trial That Should Be Conducted To Resolve Disputed Facts	1
The Interests Of Federal Rule Of Evidence 104 And Federal Rules Of Civil Procedure 26 And 37 Compete In A *Daubert* Context, And The TMI District Court Improperly Drew A Balance That Violated The Nature of A Fed. R. Evid. 104(a) Hearing	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Bourjaily v. United States, 483 U.S. 171 (1987) .. 10

California v. Green, 399 U.S. 149 (1970) 4

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 1, 2, 4, 8, 9, 10

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 1, 8

In re Paoli RR Yard PCB Lit., 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995) 3, 4, 8

In re TMI, 193 F.3d 613 (3d Cir. 1999) 8

In re TMI Litigation Cases Consolidated II, 910 F. Supp. 200 (M.D. Pa. 1996) 3

In re TMI Litigation Cases Consolidated II, 911 F. Supp. 775 (M.D. Pa. 1996) 3

In re TMI Litigation Cases Consolidated II, 922 F. Supp. 997 (M.D. Pa. 1996) 3

In re TMI Litigation Cases Consolidated II, Civil Action No. 1:CV-88-1452 (M.D. Pa., slip. op. March 12, 1996) 4, 9

Cited Authorities

Page

United States Constitution:

Seventh Amendment 1, 2, 8

Rules:

Fed. R. Civ. P. 26 ..... 9, 10

Fed. R. Civ. P. 37 ..... 9, 10

Fed. R. Evid. 104 ..... 9, 10

Fed. R. Evid. 104(a) 9, 10

Other Authorities:

A Review of Dose Assessments at Three Mile Island and Recommendations for Future Research (Beyea, August, 1984) 6, 7

Supplement #1 to a Review of Dose Assessments at Three Mile Island and Recommendations for Future Research (Beyea, October, 1984) 6, 7

Respondents argue that Court review is not warranted, because in Respondents' opinion, the reasons articulated in support of the Petition are mutually inclusive, so as to have the effect of canceling each other out. This is not the case, and furthermore, Petitioners are not familiar with any rule of law that precludes arguing alternative reasons in support of a requested relief. The case presented by Petitioners warrants review on each of the two grounds stated, and they respectfully request the Court to grant same.

Review Is Necessary To State A Rule Of Law That Restricts District Courts From Transforming A *Daubert*[1] Hearing Into A Surrogate For The Seventh Amendment Jury Trial That Should Be Conducted To Resolve Disputed Facts

Review should be granted because there is a need for the Court to definitively instruct district courts that their power to explore the reliability (and hence the admissibility) of an expert's opinion under *Daubert* is not so extensive as to allow the *Daubert* proceedings to be used as the trial on the merits for the resolution of facts and conclusions disputed by qualified experts. The need for Court review for this purpose became more acute in light of the Court's decision in *Joiner*[2], which limits the review power of a court of appeals to deciding whether a district court abused its discretion in making the reliability/admissibility determination. Indeed, with the almost routine filing of *Daubert* challenges by defendants in virtually any case that presents any issue of even mild complexity, and with the *Joiner* limit on the power of a court of appeals to review district court *Daubert* decisions, it has become all the more important for the Court to state the limits of a district court's *Daubert* inquiry to assure that district courts do not transform the gatekeeping responsibility into a surrogate for the trial on the merits where

---

1. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

2. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

there can only be a limited, abuse of discretion review by a court of appeals.

Although *Daubert* accords district courts the power to consider the admissibility of expert evidence, and Petitioners do not quarrel with such power in the first instance, Petitioners argue that the scope of that power is limited by the Seventh Amendment. This is especially so because of the corresponding limit on the power of a court of appeals to review a district court's decision. The *TMI* case places the issue in perspective, as it is a prime example of a district court exceeding its gatekeeping role, thereby violating the Seventh Amendment. Petitioners were prejudiced in their ability to overturn the district court's erroneous violation of the Seventh Amendment because the third circuit's review was limited to deciding if there was an abuse of discretion.

Petitioners suffered the *Daubert* exclusion of a majority of their expert evidence after the district court engaged in a far-reaching exploration into all facets of Petitioners' experts opinions, even though the district court judge was essentially ill-equipped to decide the daunting scientific issues presented. As noted in the Petition, "the district court cannot be faulted for lacking in energy . . . [and] its mistakes are traceable to its excessive zeal, and to its fervid desire to ensure that it deeply probed the reliability of the opinions of Petitioners' experts before allowing them to be admitted into evidence before a jury." Petition at 11. However, in probing the expert evidence, the district court so much as conceded that the weight of the task assigned to her was daunting and overwhelming:

> • The scientific issues before this court are similarly daunting: As a nation, we are grateful that we have experienced only one nuclear power reactor accident of the severity of the TMI accident. In the context of this litigation, . . . this translates into a lack of concrete data and knowledge. . . . This [is] a journey into unchartered waters.

In re TMI Litigation Cases Consolidated II, 911 F. Supp. 775, 788 (M.D. Pa. 1996) [J. App. 546a][3];

- [Kozubov's] methodology lacks general acceptance . . . because of the paucity of nuclear disaster[s] . . . [not] because the methodology lacks merit.

In re TMI Litigation Cases Consolidated II, 910 F. Supp. 200, 202 (M.D. Pa. 1996) [J. App. 667a];

- Whether the TMI area was or is contaminated is a central issue in this lawsuit, and a question that has remained largely unanswered in the scientific community for nearly two decades. . . . Thus, the court is placed in the uncomfortable position of making a determination as to the propriety of a particular scientific methodology where the relevant scientific community has yet to reach agreement on that very issue.

In re TMI Litigation Cases Consolidated II, 922 F. Supp. 997, 1010-11 (M.D. Pa. 1996) [J. App. 421a; 423a]

In fact, the footnote to the latter comment by the district court stated:

- [Petitioners] would argue that this is the type of factual determination that should be made by the jury, not the court. As uncomfortable as it may be for the court to make this determination, the court would abdicate its role as gatekeeper by passing this decision on to the jury.

Id. at n.15.

- Little about either *Daubert* or *Paoli II*[4] can be characterized as "well accepted."[ ] Both

---

3. Since cross-petitions for certiorari have been filed, a separate bound joint appendix ("J. App.") has been filed.

4. *In re Paoli RR Yard PCB Lit.*, 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995) ("*Paoli II*").

> decisions are recent and their proper interpretation and application are currently being refined in both the judicial and academic settings.

In re TMI Litigation Cases Consolidated II, Civil Action No. 1:CV-88-1452 (M.D. Pa., slip. op. March 12, 1996) (denying Petitioners' motion for reconsideration) (footnote added).

Accordingly, in the proceedings below, the district court journeyed into the uncharted waters of daunting scientific issues and the developing *Daubert/Paoli II* law, to deeply probe expert opinions, and made wholesale exclusionary rulings based upon a preference for the scientific issues presented by Respondents' experts. As might be expected, the parties' experts disagreed on the amount of radiation releases that occurred as a result of the TMI accident. As argued in the Petition, a classic jury trial was presented, and the cross-examination process before a jury should have been resorted to rather than wholesale exclusion of expert evidence. *See* Petition at 13, *citing California v. Green*, 399 U.S. 149, 158 (1970).

Indeed, the district court was not more qualified to determine the scientific reliability of the daunting evidence presented than a jury, and in fact a jury, comprised of multiple persons with a collective wisdom may have been better equipped to consider the scientific issues presented. This is especially so, considering the fact that many of the experts upon whom Respondents relied in their *Daubert* challenge of specific Petitioners' experts, were not even qualified in the same scientific disciplines to comment on the opinions of Petitioners' experts.

For example, the expert that Respondents proffered to challenge the admissibility of the opinions proffered by Petitioners' expert Dr. Ignaz Vergeiner, was Mr. Keith Woodard, an individual paid in excess of $600,000 by Respondents between 1990 and 1995 to investigate and express opinions on behalf of Respondents. (His pre-1990 billings had been

discarded prior to the *in limine* hearings). Mr. Woodard, unlike Petitioners' expert Dr. Vergeiner, is not a meteorologist and lacked meteorological training, yet he was offered to challenge the opinions of a Ph.D. meteorologist. Mr. Woodard made an analysis of the TMI accident grounded on a computer driven, off the shelf mathematical model of radiation plume movement, which used few data points and did not take into account the meteorological and topographical particulars of the TMI accident. Mr. Woodard's analysis had been made shortly after the accident (the accident occurred in 1979) and from Respondents' perspective, became the god spell of the plume movement that resulted from the TMI accident.

Similarly, Petitioners proffered the expert opinions of Dr. James Gunkle and Professor Vladimir Shevchenko on evidence of radiation induced damage to trees. *See* Petition at 7. Respondents challenged these opinions by proffering the testimony of several forestry experts who admitted during the *in limine* hearings that they had *no* qualifications to testify about radiation issues or about plant radio-sensitivity. Respondents' experts instead proffered opinions that the tree damage that Petitioners' experts opined was caused by exposure to radiation, may have been caused by insects. However, during the *in limine* hearing, Petitioners' experts established that they ruled out other causes than radiation exposure for the damage to the trees that they had observed. Again, a jury issue was presented, but the district court chose to intrude into this sacred area and substitute her assessment of the science for that of the collective wisdom of a jury.

The amount of radiation releases resulting from the TMI accident remains, as the district court noted, subject to great debate and uncertainties even after two decades. From Petitioners' perspective, the computer models and other devices that were used by Respondents' experts to analyze the releases of radiation and the movement and dispersion of the radioactive plumes following the TMI accident were highly suspect. In fact, Dr. Jan Beyea, a Senior Energy Scientist at the National

Audubon Society, who was not an expert for either party, made an exhaustive review of many of the studies of the TMI accident and more than five years after the accident concluded:

> a great number of questions remain about the radiation doses caused by the accident. *Because the major studies on this subject were undertaken in the months soon after the March 28, 1979 accident, and completed under considerable pressure for immediate findings and reassurances, it is not surprising that these official studies cannot provide complete, scientifically justifiable answers.* Subsequent studies in the scientific and engineering literature have not resolved the residual uncertainties.
>
> * * *
>
> *Serious limitations are associated with every study that attempts to estimate the whole-body population dose of radioactivity at Three Mile Island.* These limitations are understandable: *because of the inadequacy of monitoring equipment in place at the time of the accident, all investigating groups found it necessary to make one or more key unconfirmable assumptions.* In other words, they did the best they could in spite of the gaps in the available data.

See A Review of Dose Assessments at Three Mile Island and Recommendations for Future Research (Beyea, August, 1984) ("Review of Dose Assessments") (emphasis added).

Beyea advised that the major studies of the TMI accident had "serious limitations that prevent any of them from being conclusive." *Id.*[5] For example, Beyea noted that *equipment*

---

5. Dr. Beyea later published *Supplement #1 to a Review of Dose Assessments at Three Mile Island and Recommendations for Future Research* (Beyea, October, 1984) ("*Supplement 1*") for use in the further assessment of radiation doses caused by the TMI accident and to describe some new proposed research projects. *Supplement 1* at 1. (Cont'd)

which monitored the escape of radiation from the vent stack of the TMI auxiliary building, a major pathway for TMI accident releases, *was not functioning* during the accident. *Review of Dose Assessments*. This forced scientists to *estimate* how much radiation was released from the vent stack, *based on extrapolations* from other monitors. *Id.* Beyea also noted that TLDs may not have measured significant amounts of radiation because *too few TLDs* were deployed at the time of the accident, *creating large gaps* through which radiation may have passed undetected and further commented that there were *significant flaws in geiger counter measurements* taken from a helicopter that flew over the TMI facility. *Id.* Further, many measurements were taken two days into the accident, which required *extrapolation* back to the earlier levels of radiation at the time of the accident. *Id.*

Respondents and their experts were intricately involved in the studies that Beyea commented on as being nonconclusive and unreliable. It was because of these uncertainties that Petitioners and their experts re-evaluated the accident facts. Petitioners' experts performed many of the kinds of studies that Beyea recommended be undertaken. They reached different opinions and conclusions. Yet, it was the "god spell" of the early studies that were relied upon by the district court in concluding that the accident could not have happened in any way other than as argued by Respondents. Thus, the plausibility of Petitioners' experts' opinions and conclusions were measured against conclusions that remain the subject of debate.

Beyea's conclusion that the TMI data was uncertain could have persuaded reasonable and impartial minds that the early studies were flawed, and that Petitioners' experts' views through their re-analyses were at least as reliable and plausible as

---

(Cont'd)

Supplement 1 did not change the primary conclusion of *Review of Dose Assessments*: that the major studies of the TMI accident contained tremendous uncertainties, and that further study of the accident was needed.

Respondents'. Petitioners' evidence should have opened the door for jury consideration of a different view, but the district court closed the gate.

Thus, there is a need for Court review to set the balance between the Seventh Amendment and a district court's *Daubert* role, in light of the *Joiner* abuse of discretion standard of review[6].

With the abuse of discretion limit to a court of appeals' review, it is important that district courts be appropriately limited in their *Daubert* inquiry so as not to transform a hearing on an evidentiary issue into a surrogate for a trial. Here, Petitioners' Seventh Amendment rights were compromised, as the *Daubert* inquiry literally transformed a hearing into a surrogate for the trial by jury, and under *Joiner*, the third circuit was constrained in its review to determining whether or not there was an abuse of discretion. *See In re TMI*, 193 F.3d at 666 [J. App. 114a][7]

---

6. As noted, in *Joiner*, 522 U.S. at 138-39, the Court rejected the third circuit's view that a district court's decision on the admissibility of scientific evidence should be reviewed under a heightened or stringent abuse of discretion standard. *See In re Paoli RR Yard PCB Lit.*, 35 F.3d 717, 749-50 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995). Were courts of appeal to have greater authority to review district court expert admissibility determinations, then perhaps further direction for district courts would not be as necessary because of the layer of protection that results from a broader review power.

7. Respondents' citation to the "legion" of cases in which summary judgment flowed from the exclusion of expert evidence misses the point. Brief In Opposition For Respondents at 7, n.4. Petitioners do not debate that summary judgment can be properly entered where a plaintiff cannot meet his or her summary judgment burden, whether same results from an exclusion of expert evidence or for other reasons. However, since summary judgment can and will flow from the exclusion of expert evidence, protections are necessary to prevent wholesale exclusions of expert evidence by district courts where the review of such decisions by a court of appeals is limited by the abuse of discretion standard.

The Interests Of Federal Rule Of Evidence 104 And Federal Rules Of Civil Procedure 26 And 37 Compete In A *Daubert* Context, And The TMI District Court Improperly Drew A Balance That Violated The Nature of A Fed. R. Evid. 104(a) Hearing

Respondents argue that Petitioners seek to revitalize a "trial by ambush" approach. Not only is that not the case, but the facts of the TMI circumstances belie the allegation.

As noted in the Petition, a team of experts was assembled by Petitioners to opine on various issues relating to the Three Mile Island accident. Petitioners' experts' reports were comprehensive and in some instances, hundreds of pages long. Virtually each of Petitioners' experts was deposed. Respondents never filed a Rule 26/Rule 37 motion to compel more adequate expert disclosures.

The only "ambush" that occurred in the TMI litigation was the ambush perpetrated by Respondents in persuading the district court that an expert had a limited, if any right, to respond to challenges to the expert's opinion during the *Daubert* inquiry. That rule of law adopted by the district court in connection with its "[seminal] interpretation and application [of *Daubert*] . . . in . . . the judicial . . . setting", *In re TMI*, *supra* (M.D. Pa. Slip. Op., March 12, 1996), made the so called *Daubert* inquiry virtually meaningless, for it precluded a challenged expert from having an opportunity to supplement and explain why his or her report and the methods utilized reached conclusions that were sufficiently reliable to be admitted for consideration by a jury.

Respondents cite the Advisory Committee Note to the 1993 Amendments for the proposition that Rule 26 was amended so as to avoid trial by ambush and presumably to possibly dispense with the need to depose an expert. *See* Respondents' brief at 13. The proposition is a fallacy. In the TMI litigation, as occurs in virtually every other case, expert depositions were taken and likely would have been taken regardless of the length and extent

of the expert reports. Defendants rarely waive the opportunity to take an expert deposition, and here, Respondents never argued that Petitioners' experts' reports were "of little help in preparing for [the] deposition of the witness." *Id.*

While Respondents suggest that there is no need for Court review on the propriety of the use of Civil Rules 26 and 37 to limit the scope of the record in an Rule 104(a) evidentiary hearing, their primary support comes from an academic, Professor Berger. *See* Respondents' brief at 13-14. Professor Berger has simply expressed her suggestions on how a *Daubert in limine* inquiry should be conducted, but her perspective on the interplay between the *Daubert* inquiry and a Federal Rule of Evidence 104 hearing is *not* authoritative for overruling this Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987).

It is plainly clear that Respondents cite no Supreme Court precedent that addresses the issue. Yet, this Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987) speaks loudly for the proposition that the information to be considered by a district court in the context of a Federal Rule of Evidence 104(a) hearing is very broad, even if the information is otherwise inadmissible. *Bourjaily* has not been overruled, but in the *Daubert* hearings here, the district court found Fed. R. Civ. P. 26 to govern the proceedings. This improper procedural ruling demonstrates that the district court wrongly perceived its role in the *Daubert* inquiry to be the equivalent of the ultimate fact finder in a proceeding that was conducted as the surrogate for a trial on the merits. The application of trial-like evidentiary rules on the admissibility of evidence during the course of a preliminary hearing which was not conducted in the presence of a jury, was wrong.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

ARNOLD LEVIN
Counsel of Record
LAURENCE S. BERMAN
LEVIN, FISHBEIN, SEDRAN & BERMAN
510 Walnut Street, Suite 500
Philadelphia, PA 19106
(215) 592-1500

LEE C. SWARTZ
TUCKER, ARENSBERG & SWARTZ
111 North Front Street
P.O. Box 889
Harrisburg, PA 17108
(717) 234-4121

LOUIS M. TARASI, JR.
THE TARASI LAW FIRM, P.C.
510 Third Avenue
Pittsburgh, PA 15219-2191
(412) 391-7135

Attorneys for Petitioners